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7       UNITED STATES OF AMERICA,  
8    Plaintiff,  
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10    v.  
11        DEANTE KINCAID,  
12    Defendant.

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14    Case No. 13-cr-00818-PJH-2

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16    **ORDER DENYING MOTION FOR  
17    APPOINTMENT OF COUNSEL**

18    Re: Dkt. No. 531

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20       The defendant in the above-captioned case has filed a pro se motion for  
21       appointment of counsel. See Dkt. 531. Defendant cites recent Supreme Court and  
22       circuit court precedent regarding convictions for a “crime of violence” under 18 U.S.C.  
23       § 924(c), and then “request[s] the court to appoint counsel to help file the proper motion  
24       to correct, vacate, or set aside his unconstitutional 924(c) conviction.” Id. at 1. The court  
25       construes defendant’s request as one for appointment of counsel to file a motion  
26       pursuant to 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence.

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28       The Sixth Amendment’s right to counsel does not apply in habeas actions. See  
29       Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir. 1986). However, 18 U.S.C.  
30       § 3006A(a)(2)(B) authorizes a district court to appoint counsel to represent a habeas  
31       petitioner whenever “the court determines that the interests of justice so require.”  
32       Generally, the decision to appoint counsel is within the district court’s discretion. See  
33       Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986). The purpose of § 3006A is to  
34       provide appointed counsel whenever the failure to do so would amount to a denial of due  
35       process. Id.

1       The court notes that defendant has previously filed a motion for appointment of  
2 counsel, which was also sought in connection with the filing of a § 2255 motion to  
3 challenge his conviction under § 924(c). See Dkt. 404. The court denied that first  
4 motion, concluding that the interests of justice did not require appointment of counsel at  
5 that time. See Dkt. 406.

6       Defendant subsequently filed a pro se § 2255 motion, challenging his conviction  
7 under § 924(c). See Dkt. 440. The court denied the motion after it “determine[d] that the  
8 motion conclusively shows that defendant is entitled to no relief.” See Dkt. 448 at 7.

9       Next, defendant filed a motion styled as a Rule 60(b) motion for reconsideration.  
10 See Dkt. 484. However, after review of the motion, the court concluded that, “while  
11 styled as a Rule 60(b) motion, defendant’s filing is in substance a second or successive  
12 habeas petition under § 2255.” See Dkt. 511 at 3. The court noted in its previous order  
13 that a federal prisoner who is “claiming the right to be released upon the ground that the  
14 sentence was imposed in violation of the Constitution or laws of the United States” may  
15 file a § 2255 motion with the district court that imposed the sentence, but if the district  
16 court denies the § 2255 petition, the petitioner may not bring a “second or successive”  
17 petition without first obtaining a certification from the court of appeals. See 28 U.S.C.  
18 § 2255(h). If a district court determines that the motion is a second or successive § 2255  
19 petition, the court lacks jurisdiction to hear the motion. See United States v. Washington,  
20 653 F.3d 1057, 1065 (9th Cir. 2011); see also United States v. Allen, 157 F.3d 661, 664  
21 (9th Cir. 1998). Accordingly, because defendant had not obtained a certification from the  
22 Ninth Circuit, the court determined that it lacked jurisdiction to hear the motion. See Dkt.  
23 511 at 3.

24       Now, defendant seeks appointment of counsel to file another § 2255 petition, but  
25 defendant has not indicated that he has obtained certification from the Ninth Circuit to file  
26 any such petition. And for the reasons explained above, the court would lack jurisdiction  
27 to hear any such petition, absent Ninth Circuit certification. Thus, the court directs  
28 defendant to provide the court with either (1) a copy of any certification to file a second or

1 successive petition that he has obtained from the Ninth Circuit, or (2) legal authority that  
2 excuses him from the requirement to obtain such certification. Defendant is directed to  
3 provide a response no later than **March 15, 2023**.

4 As to defendant's motion for appointment of counsel (Dkt. 531), the court  
5 concludes that the interests of justice do not require appointment of counsel at this time,  
6 and defendant's motion for appointment of counsel is denied without prejudice to renewal  
7 should defendant have or obtain certification to proceed with a second 2255 motion.

8 **IT IS SO ORDERED.**

9 Dated: February 2, 2023

10 /s/ Phyllis J. Hamilton  
11 PHYLLIS J. HAMILTON  
United States District Judge

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United States District Court  
Northern District of California